

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

**MODERN RULES OF PROCEDURE FOR THE
ISSUANCE OF ADVISORY OPINIONS IN
NATURE OF SERVICE PROCEEDINGS**

Docket No. RM2012-4

**APWU REPLY COMMENTS TO ADVANCE NOTICE OF
PROPOSED RULEMAKING ON MODERN RULES OF PROCEDURE
FOR NATURE OF SERVICE CASES UNDER 39 U.S.C. § 3661
(July 17, 2012)**

In accordance with Order No. 1309, filed April 10, 2012, the American Postal Workers Union, AFL-CIO (APWU) and seven other parties, including the United States Postal Service (Postal Service or USPS) submitted initial comments on possible changes to the rules governing Section 3661 proceedings before the Commission.¹ The APWU hereby submits these Reply Comments in response to arguments offered in the Initial Comments of various parties, with a primary focus on the positions advanced by the Postal Service.

Introduction

Eight parties, including the APWU, submitted comments in response to the Commission's Advance Notice of Proposed Rulemaking. All parties appear to agree that there is value in making some changes to the current procedures so that

¹ See APWU Initial Response to Advance Notice of Proposed Rulemaking on Modern Rules of Procedure for Nature of Service Cases under Section 3661 ("APWU Comments"), filed June 19, 2012; Comments of David B. Popkin ("Popkin Comments"), filed June 18, 2012; Comments of the Public Representative in Response to Order No. 1309 ("Public Representative Comments"), filed June 18, 2012; Comments of National Newspaper Association Witness Comments on Proposed Rules for Nature of Service Proceedings ("NNA Comments"), filed June 8, 2012; Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Comments on Advance Notice of Proposed Rulemaking ("Valpak Comments"), filed June 18, 2012; and United States Postal Service Initial Comments ("USPS Comments"), filed June 18, 2012; and Letter of U.S. Senator Tom Carper ("Carper Letter"), submitted June 15, 2012.

Commission decisions can be issued quicker and participation can be more effective. In our Initial Comments APWU espoused the view that a radical departure from the current rules, including curtailing or eliminating participant driven discovery and removing the right to oral cross-examination before the Commission, is not appropriate and would violate the due process rights of users of the mail that are guaranteed by Section 3661. The majority of commenters agree. In fact, of the comments filed, the Postal Service and Senator Carper are the only parties that advocate implementation of bare minimum procedures in N-cases. The positions advocated by the Postal Service and Senator Carper must be rejected in order to comply with Section 3661 of Title 39.

II. The Postal Service's Heavy Reliance on Citizens Awareness Is Misplaced

Throughout its brief the Postal Service relies heavily on Citizens Awareness Network, Inc. v. US Nuclear Regulatory Commission, 391 F.3d 338 (1st Cir. 2004) ("Citizens Awareness") as support for its position that only skeletal procedures are required for N-cases. However, this reliance is misplaced.

In its Initial Comments Valpak convincingly explains that Citizens Awareness does not apply to Commission's considerations of changes to postal services under Section 3661. Valpak Comments at 13-17. First, Valpak notes that the initiation of Nuclear Regulatory Commission ("NRC") proceedings at issue in Citizens Awareness are initiated differs greatly from the initiation of N-cases. Specifically, N-cases can only be initiated by the Postal Service, whereas NRC proceedings can be triggered by the request of "any person whose interest may be affected." Valpak at 13. This is significant because the volume of NRC proceedings possible far exceeds the number of N-cases possible, thereby making the need for more streamlined proceedings necessary and reasonable in NRC cases, but not in Section 3661 determinations.

In addition, as Valpak notes the interests at stake in NRC proceedings are vastly different than the interests of user of the mail in maintaining postal services. Valpak reasons that this warrants more robust procedures than are required under Citizens Awareness. We agree. The particular interests of users of the mail, especially those

businesses and individuals who relies heavily on the Postal Service, are important, and unlike NRC licensing proceedings, changes in postal services could result in specific, significant and harmful effects on mail users. The potential for such harmful consequences, particularly under a rate-cap regime which limits the ability to raise rates, while incentivizing unnecessary and unlawful reductions in service to cut costs, necessitates the full panoply of due process rights guaranteed in Sections 556 and 557 of the APA to ensure that the impact on users of the mail are properly considered and justified before making fundamental changes to postal services.

Also of importance to the Commission's consideration of the applicability of Citizens Awareness is the fact that the 1st Circuit does not have jurisdiction over 3661 actions. Section 3663 of Title 39 vests jurisdiction to hear appeals from Commission orders with the U.S. Court of Appeals for the District of Columbia. Therefore, Citizens Awareness has at most only persuasive effect.

However, even if Citizens Awareness were controlling authority in Commission cases, the facts of Citizens Awareness pertaining to NRC licensing proceedings differ significantly from the circumstances present in N-cases. Accordingly, the rationale of the 1st Circuit Court of Appeals for upholding only skeletal procedures in NRC licensing proceedings is inapplicable to PRC consideration of N-cases.

The fact that N-cases can only be initiated by the Postal Service means that, unlike NRC proceedings, the number of N-cases will be limited. Therefore, truncated procedures are not needed to address the volume of N-cases. Second, in Citizens Awareness, the Court recognized that NRC licensing proceedings were lengthy, noting that some proceedings lasted as long as seven years. Citizens Awareness, 391 F.3d at 343. Thus, there was a reasonable need to ensure that proceedings moved more quickly. In contrast no PRC N-case proceeding has ever taken longer than approximately 1 year from the filing of the Postal Service's original request to the issuance of the Commission's advisory opinion. In fact, N-cases have been resolved in 8 months on average. For many reasons, particularly the scope of changes that have been at issue in N-cases and the likely far-reaching implications of these changes, it is only reasonable that N-cases require eight months or more to complete. As discussed

more fully below, putting an arbitrary time-limit on these proceedings is not only unnecessary it is also inappropriate under the current requirements of Section 3661. Even so, in upholding the NRC's minimal procedures for licensing hearings, the Court in Citizens Awareness was clearly conscience of the unreasonable length and volume of NRC proceedings. Since those concerns are not present in N-cases, the Citizens Awareness reasoning does not apply here.

Moreover, the First Circuit noted that the controlling statute in Citizens Awareness only requires that the Commission "upon request of any person whose interest may be affected' by certain agency actions, [hold] 'a hearing.' It does not explicitly require that the hearing be on the record." 391 F.3d at 348. In contrast, Section 3661 of Title 39, specifically requires that the Commission provide "an opportunity for a hearing on the record." Thus, what is required of the NRC is far different than what the Commission is mandated to do under its governing statute.

Finally, in Citizens Awareness the Court upheld the elimination of traditional discovery in favor of mandatory disclosures. The use of mandatory disclosures, the Court reasoned that the NRC rules "provide meaningful access to information from adverse parties in the form of a system of mandatory disclosure." 391 F.3d at 350. In NRC licensing cases, the scope and range of topics at issue are likely to be consistent from case to case. This similarity enables the construction of meaningful mandatory disclosure requirements that will ensure that all necessary information is provided. However, the issues presented in N-case dockets have a much broader range. For example the Postal Service has sought to eliminate Saturday delivery, close thousands and Post Offices and in the current Docket No. N2012-1, eliminate overnight delivery of a significant portion of First Class Mail. Admittedly, at issue in all of these cases is whether the changes proposed comply with the policies of Title 39. But, the evidence required to evaluate possible changes in postal services varies depending on what particular provisions of Title 39 are implicated by the proposed changes. In addition, the Postal Service regularly presents only the bare minimum of information required under the current rules and it is unlikely the Postal Service would be more forthcoming without participant-initiated discovery. Consequently, the Commission can design no set of

mandatory disclosure rules, like those upheld in Citizens Awareness, that would ensure the "meaningful access" to information from the Postal Service. Because there is no appropriate alternative to discovery from participants, the Court's holding on this point in Citizens Awareness is not relevant and should have no bearing on the Commission's revised rules of procedure in Section 3661 cases.

III. The Law and Subject Matter of N-Dockets Require Robust Discovery Procedures and Other Information Gathering Tools, Therefore, Proposals that Would Eliminate Key Elements of N-Docket Proceedings Must Be Rejected

The Postal Service's central position appears to be that since the Commission's decision in Section 3661 case is advisory only bare procedural requirements are warranted. Even if that position was not fatuous, this contention fails because it wrongly assumes that the Commission's only role in Section 3661 cases is to issue an advisory opinion. In so doing, the Postal Service blatantly ignores the mandate found in Section 3661(c):

The Commission shall not issue its opinion on any proposal until an opportunity for a hearing on the record under Section 556 and 557 of title 5 has been accorded to the Postal Service, users of the mail, and an officer of the Commission who shall be required to represent the interests of the general public.

Section 556(d) provides in relevant part:

...the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

...

A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Thus, by the plain language of Section 3661 the Commission must ensure that “the Postal Service, users of the mail, and an officer of the Commission [representing the interests of the public] are afforded due process as required by Sections 556 and 557 of the Administrative Procedures Act. In order to do so, the Commission must provide an opportunity for meaningful discovery, and the opportunity for hearings before the Commission. In an apparent recognition of the constraints imposed by Section 3661 on radical changes to Commission procedures in N-cases, the Postal Service begins its initial presentation by stating that it does not believe that regulatory changes are the best and most efficient means of addressing “the strains that have recently accompanied [N-cases]. Instead the Postal Service believes that the simplest, most certain, and therefore most meaningful course to improve N-cases’ relevance and value is that approved by the current Senate, with its 90-day time limit on N-cases and its lifting of the applicability of formal hearing requirements under 5 U.S.C. §§ 556 and 557 referring to S. 1789, 112th Cong. § 208 (2012). Postal Service Comments at 2. To the extent that this position appears to concede that far-reaching changes to the procedures followed in N-cases, like those proposed by the Postal Service, are not possible under the current statutory scheme, we agree. The changes advanced by the Postal Service, each addressed in turn below, simply do not comply with the current due process mandates of Section 3661. The changes the Postal Service advocates require legislative action and unless and until such action is taken, the Commission must continue to structure its rules to guarantee the full protection of the due process rights of users of the mail.

A. USPS Proposed Time-Limit for N-case Decision Is Not Reasonable

In its Initial Comments, the Postal Service contends that “the goal of this rulemaking should be to implement procedures that would permit a decision in 90 days.” USPS Comments at 3. The proposal that all N-cases decisions be issued in 90 days does not comply with the requirements of Section 3661 and therefore, should not be adopted by the Commission in this rulemaking.

Specifically, Section 3661 requires that the Postal Service file a request for a Commission advisory opinion “a reasonable time prior” to when implementation is expected. A survey of all past N-cases clearly demonstrates that a “reasonable time” far exceeds the proposed 90 days. See Excel Document Title “Survey N-Cases” attached hereto. In fact, of the 10 N-cases initiated since 1975, no case has been resolved within 90 days. The only case that may come close to meeting this deadline is the currently pending N2012-2, which involved only one Postal Service witness and no rebuttal testimony. Otherwise, the majority of cases have taken over 5 months to complete. Given that the changes that have been presented since the passage of the PAEA have involved much more significant changes to services with greater risk of negative consequences, especially since the PAEA inevitably encourages reductions in service to save costs since any given rate increase cannot exceed the CPI, it is reasonable to assume that N-cases dockets will continue to require several months to resolve, making 90 days simply unreasonable. This assumption finds comports with the Commission’s holding in its N75-2 Advisory Opinion:

Since this is the first advisory opinion issued by this Commission, a few preliminary comments concerning procedures are in order. In this regard, we note that 39 U. S. C. § 3661(b) states that the proposal shall be submitted “within a reasonable time prior to the effective date of such proposal.” The Postal Service filed this case on May 1, 1975, indicating that it expected to implement its program on August 1, 1975. We believe that we have expedited this case to the greatest extent possible, while still affording the parties due process, consistent with the requirements of the statute. In this regard, no hearings were held and the parties were able to settle most of their differences in a stipulated report to the Commission. Yet, even under this expedited procedure, the case was not concluded until the filing of the Service’s reply comments on August 8, 1975.

The Commission requires sufficient time to hold hearings ^{4/} and issue a well-reasoned opinion that will assist the Postal Service in implementing its service program. **What constitutes a reasonable amount of time depends upon the circumstances of each case, but it seems to us that three months is prima facie unreasonable.** After further experience under § 3661, we believe that a rulemaking proceeding would be the proper forum for setting related ground rules. But until that occurs, **we request that whenever possible the Postal Service file its § 3661 requests at least six months prior to the proposed implementation of the programs.** (CITE) [emphasis added].

Additionally, the Presiding Administrative Law Judge in his N75-1 Initial Decision also recognized that “a reasonable time prior” generally requires a substantial lead time for N-case consideration:

It must be recognized that the delay is not regulatory lag as such but the need for purposes of making an informed record of obtaining data from Postal Service and providing others, the OCC and intervenors, with time to prepare evidence, including time to obtain expert witnesses. **The realities dictate a longer lead time than presently provided in section 72 of the Rules of Practice, as a general proposition.** (Footnote 1) [emphasis added]

Clearly, then any effort to require N-cases be resolve completely within no more than 90 days must be rejected as not reasonable under Section 3661(a).² The Postal Service’s proposed tiered approach that would have decisions issued for the simplest changes made in 45 days, decisions in moderately complicated cases in 60 days, and decisions on the most complex cases would be due in 90 days, fails for the same reason. This matrix is unrealistic; it unduly restricts due process rights; and elevates speed of a decision over the quality and utility of the Commission decision. Furthermore, this proposal ignores the reality that the time required to fully litigate N-cases is almost solely the responsibility of the Postal Service; its conduct can expedite or slow down these proceedings far more than the conduct of the any other party. Finally, the matrix proposal must be rejected as it assigns the responsibility for categorizing the cases under the matrix to itself. Under Section 3661 the Commission has the authority to determine what a reasonable time prior means, not the Postal Service as this proposal would allow. It is also inconsistent with due process requirements and would permit the Postal Service to arbitrarily assign categories based on its perceived need of when the change would need to be implemented.

² For these reasons we agree with Valpak that the Rule 3001.72 reference to “no less than 90 days” should be deleted as inconsistent with Section 3661. The 90 day estimate may have seemed like a reasonable deadline when the rule was created, prior to any N-case proceeding, but experience over the past 30 years demonstrates that while N-cases vary widely from one to the other, 90 days has never been a suitable time limit for any N-case proceeding, regardless of the significance of the change or degree of impact. See Survey N-Cases Attached.

B. Opportunity for Robust Discovery By Participants Should Be Maintained

In its Initial Comments, USPS expresses the belief that it is appropriate to “circumscribe[e] party discovery in favor of information-gathering by a presiding officers – as consistent with 5 U.S.C. §§ 556 and 557. (USPS Comments at 15). In support of this belief, the Postal Service relies on the First Circuit Court of Appeals Decision in Citizens Awareness. For the reasons explained above, this reliance is misplaced. Section 556 and 556 does not permit the elimination of party discovery in N-cases under Section 3661.

Section 556(d) of Title 5 states:

A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

Because the interests of the parties participating in N-cases may be vastly different, avenues for rebuttal may be wide-ranging. Since the Commission has limited resources, there is simply no way that it can insure through Commission initiated discovery alone, that the parties are able to obtain evidence needed for meaningful rebuttal. The Commission recognized the importance of participation by users of the mail and the public in N-cases in its Report Complaint on Sunday and Holiday Collections, C2001-1:

Congress has determined that eliciting public input in an open forum is an integral part of the process of developing postal services that meet the needs of Postal Service customers and fulfill the requirements of the Act. Section 3661 is the statutory tool provided by Congress for gathering such public input. Section 3661(b) requires the Postal Service to seek an advisory opinion from the Commission when it “determines that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis... .” The Commission is required to provide “an opportunity for a hearing on the record” where “users of the mail” may express their views on such proposals, and the Commission is further required to consider these views and provide the Postal Service with an Advisory Opinion on the proposed changes. § 3661(c).

...

Obtaining the views of Postal Service customers is vitally important where the Postal Service's monopoly First-Class Mail product is concerned. The privilege of a governmentally established monopoly status includes the responsibility to hear and consider the needs of the constituency that must function under the constraints of that monopoly. Actions that are, or are perceived to be unilateral in nature may disenfranchise users to the ultimate detriment of the monopoly product. The potential for disenfranchising First-Class Mail customers in a period of declining First-Class Mail volume should especially concern the Postal Service. This report highlights the failure of the Postal Service to meet its obligations under § 3661 by not seeking the views of its customers, or the independent review of the Commission, prior to changing the availability of its monopoly protected First-Class Mail product.

In order ensure that Section 3661's statutory role to ensure public input is obtained and relied upon in N-cases, participant discovery must be retained.

In its Initial Comments the Postal Service proposes that if the Commission keep party initiated discovery it delineate topics of relevance in each proceeding at the beginning to limit the scope of discovery (USPS Brief at 17-18). While this may have appeal in theory, in actuality, some important issues are not readily apparent from the initial filings and it is only through discovery that they come to light. Thus, there is no practical way to further limit the scope of discovery beyond the limitations contained in the Commission's current rules, without running up against the due process rights of the participants. Therefore, this proposal must be rejected.³

Conclusion

APWU appreciates the opportunity to offer comments on possible changes to the procedures followed in Section 3661 cases. For the reasons discussed above and in our Initial Comments, the Postal Service suggests that would severely reduce the due process afforded to users of the mail in N-cases must be rejected. We believe that the suggestions we have offered in our Initial Comments, which are fully consistent with the due process requirements of Section 3661, should be considered instead as

³ Likewise, proposals to eliminate the right to oral-cross examination in hearings before the Commission must also be rejected.

appropriate and effective ways of making the Commission's review process more efficient and its advice timely.

Respectfully submitted,

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